SUPREME COURT, U.S.
FILED
JAN 27 2014
OFFICE OF THE CLERK

Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF LIBERTY, LIFE , AND LAW FOUNDATION, THOMAS MORE SOCIETY, AND CHRISTIAN FAMILY COALTION AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Liberty, Life and Law Foundation, the Thomas More Society, and Christian Family Coalition, as *amici curiae*, respectfully urge this Court to reverse the decision of the Third Circuit and affirm the decision of the Tenth Circuit.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits. LLLF has filed amicus briefs in several cases across the nation challenging the constitutionality of federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (the "Act" or "ACA"), compelling certain employers to provide health insurance coverage for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

The Thomas More Society ("TMS") is a not-for-profit, national public interest law firm founded in 1997 that seeks to restore respect in law for life,

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[1] The parties have consented to the filing of this brief. *Amici curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

marriage, and religious liberty. TMS provides *pro bono* legal services in many different types of cases, including protecting the First Amendment religious liberty rights of corporations, organizations, and individuals from involvement with or facilitation of abortion, abortion-causing drugs, contraception, or sterilization. As explained more fully herein, the Thomas More Society and its fellow amici urge this Court to protect the religious liberty of employers who seek to keep their faith when doing business—particularly in cases where, as here, the government can show no compelling reason that might justify forcing individuals to violate their sincerely held religious convictions.

Christian Family Coalition ("CFC") is a Florida organization established to empower families at the grassroots level and give them a voice in government. CFC informs and educates citizens about candidates and pending legislation, trains Christian leaders, and defends the legal rights of Christians. CFC is concerned about the Mandate's threat to the legal right to operate a business according to conscience and faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees religious liberty to individuals, like the owners of Conestoga Wood Specialties and Hobby Lobby, who participate in public life and conduct business according to their moral, ethical, and religious convictions.

But now, the Mandate imposes crippling penalties on these entrepreneurs unless they provide employee health insurance that covers contraception, sterilization, and related educational/counseling services, in violation of the owners' religious faith. This Mandate is a frontal assault on liberties Americans have treasured for over 200 years—liberties no person should ever be required to sacrifice as a condition for owning a business.

Some supporters of the Mandate reframe the issue in terms of discrimination against women,[2] arguing that the Mandate is necessary to achieve gender equality in the workplace and that failure to comply constitutes "discrimination" against women. That rabbit trail diverts attention from the heart of this case: liberty of conscience, religious freedom, and integrity.

ARGUMENT

I. OPERATING A PRIVATE BUSINESS IN ACCORDANCE WITH CONSCIENCE IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION PROHIBITED BY THE CONSTITUTION.

The owners of Conestoga and Hobby Lobby are individuals who wish to conduct their businesses with integrity, setting company policies consistent with conscience, moral values, and religious faith. Not everyone shares those same values, but cutting conscience out of the commercial sphere is a

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[2] The American Civil Liberties Union has made such arguments in amicus briefs in many of the HHS Mandate cases.

frightening prospect for customers, employees, and business owners. It is hardly "discrimination" to decline to advance a politically charged agenda, particularly since no person has a right to *free* contraceptive services funded by an unwilling private employer.

A. Respect For Individual Conscience Is Deeply Rooted In American History.

The American legal system has traditionally respected conscience, as illustrated by the statutory and judicially crafted exemptions granting relief from the moral dilemma created by mandatory military service. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to systematically crush the conscience of its citizens. But that is exactly what the Mandate does, breeding a nation of business owners who lack *conscience*—citizens who must set aside conscience, values, and religion just to remain in business. The sheer number of pending lawsuits testifies to the gravity of the matter.[3]

Many state constitutions link free exercise to "liberty of conscience." One Minnesota court ruled in favor of a religious deli owner who refused to deliver food to an abortion clinic, observing that: "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993). Although "freedom of conscience" is even broader than "free exercise of religion," the First Amendment explicitly protects religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

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[3] There are 91 pending cases, per "HHS Mandate Information Central." See http://www.becketfund.org/hhsinformationcentral/ (last visited 01/23/14).

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: The Mandate requires business owners to violate conscience and religious faith by financing activities they believe to be immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

B. Courts Have Long Respected The Conscience Rights Of Both Patients And Health Care Professionals.

There is a long history of respect for the conscience and moral autonomy of both patients and health care professionals. Women may have a legal right to contraception and abortion, but "to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients." J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002). The conscience and integrity of a private employer is entitled to respect. Instead, the Mandate has a corrosive impact on American society by compelling people of faith to facilitate and/or finance services they consider immoral.

After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that:

"Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 627-628 (2006). Almost every state has also enacted conscience clause legislation. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006).

C. Like Many Successful Free Exercise Cases, This Case Involves *Conscientious Objectors*—Not Civil Disobedience.

Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involve conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("*Barnette*") (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith,* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

Conscientious objector claims are "very close to the core of religious liberty." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Religious entrepreneurs should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety.

This Court's decision has broad ramifications for others burdened by legal directives to act against conscience. It is difficult to pinpoint the myriad of situations where legal mandates may invade conscience. In light of the high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect private employers who decline to finance or facilitate morally objectionable medical services.

II. AN EMPLOYER'S REFUSAL TO FINANCE OR FACILITATE CONTRACEPTION IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION PROHIBITED BY THE CONSTITUTION.

Modern anti-discrimination principles have expanded over the years, increasing the potential to encroach on religious liberty. Commentators have observed the legal quagmire in the context of statutory protections:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving

> competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Conestoga and Hobby Lobby challenge only a fraction of the required "comprehensive package." *Tyndale House Publ'rs, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 127 n. 17 (D.D.C. November 16, 2012). "The government does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Hobby Lobby v. Sebelius*, 2013 U.S. App. LEXIS 13316, *77 (10th Cir. 2013). Most services unique to women are not morally objectionable—childbirth, prenatal care, mammograms, pap smears, breast or cervical cancer treatments.[4] Conestoga and Hobby Lobby employees, like their counterparts in the recent *Gilardi* case, will continue to receive valuable health care benefits:

> The Gilardis' employees will still receive an array of services such as well-woman visits,

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[4] Although these services are not part of the Mandate, religious employers' willingness to provide them indicates they are not engaged in discrimination against women.

> gestational-diabetes screenings, HPV testing, counseling for sexually-transmitted infections, support for breastfeeding, and counseling for interpersonal and domestic violence. *See Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/.

Gilardi v. United States HHS, 733 F.3d 1208, 1224 (D.C.C. 2013). The owners here carve out only those services they cannot in good conscience facilitate or finance. Seen against the backdrop of common law principles and the First Amendment, their conduct is not unlawful discrimination against female employees.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service to a customer without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But the Massachusetts legislature broadened the scope, adding more protected categories and more places subject to the law. *Id.* at 571-572. The same trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations—increasing the potential for collision with First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Protection also expanded, adding criteria such as prior

criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2.

Similarly, the statutory predecessor to California's Unruh Act (Cal. Civ. Code § 51), enacted in 1897 to codify common law doctrines, originally encompassed "inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement." Stats. 1897, ch. 108, p. 137, § 1, cited in *In re Cox*, 474 P.2d 992, 996 (Cal. 1970). The Act expanded over the years to cover more places and people. Public conveyances were added by amendment in 1919 (Stats. 1919, ch. 210, p. 309, § 1), and in 1923 the legislature added places serving ice cream or soft drinks (Stats. 1923, ch. 235, p. 485, § 1). Case law also fueled the expansion: *Orloff v. Los Angeles Turf Club*, 227 P.2d 449 (Cal. 1951) (race track could not expel man of immoral character); *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951) (homosexuals may obtain food and drink at a public restaurant). What the Act clearly forbids is the "irrational, arbitrary, or unreasonable discrimination" prohibited by the Equal Protection Clause. *In re Cox*, 474 P.2d at 999. Discrimination is "arbitrary" where an entire class of persons is excluded without justification. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982). But it is hardly "arbitrary" to avoid promoting a cause. *Hurley*, 515 U.S. 557 (parade organizers did not exclude any individuals, but could not be compelled to grant access to an organization promoting a cause they did not support). When Unruh Act amendments were considered in 1974, the Legislative Counsel cautioned that "a construction of the act that would prohibit discrimination on any of the

grounds enumerated therein *whether or not such action was arbitrary* would lead to *absurd results*." *Isbister v. Boys Club of Santa Cruz*, 707 P.2d 212, 222 (Cal. 1985) (emphasis added).

This Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate about controversial social issues. *Id.* at 188.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious persons or groups are swept within the ambit of the law. Government has no right to legislate a particular view of sexual morality and compel religious institutions and individuals to facilitate it. Religious voices have shaped views of sexual morality for

centuries. These views about right and wrong are deeply personal moral and ethical convictions that shape the way people of faith live their daily lives, both privately and in public.

The clash between non-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers.*" *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Non-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and nondiscrimination principles emerges in many contexts. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 224-225. Employers may find themselves in a conundrum—protecting one group of employees while alienating another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But even if private sexual conduct is legally protected from government intrusion, that protection does not trump

the First Amendment rights of those who cannot conscientiously endorse it—*let alone finance or facilitate it*.

B. Many Decisions Necessitate Selection Criteria.

Discrimination may or may not be invidious—and thus rightly prohibited—depending on the context and identity of the person or group that discriminates.

Everyone experiences discrimination. Employers "discriminate" when they select employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, it may be wise to enact protection. But it is impossible to eradicate all discrimination.

C. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience and/or religious conviction is not the arbitrary, irrational, or unreasonable discrimination the Constitution prohibits.

The law may proscribe the refusal to conduct business with an entire group based on personal animosity or stereotypes. But the First Amendment demands that courts seriously consider religious motivation. In the unemployment cases, this Court warned that "to consider a religiously motivated

resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Similarly, this Court would exhibit hostility toward religion by equating an employer's religious objections to the Mandate with unlawful "discrimination."

Motivation is a key factor. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment based on religious convictions, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. But the same act—premeditated with malice aforethought—is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences.

Cutting through the fog demands examination of the circumstances. Anti-discrimination laws rightly protect against refusing a customer on the basis of a truly irrelevant personal characteristic. But in some circumstances, religious faith may be a valid defense to a state law discrimination charge, e.g., *Rasmussen v. Glass,* 498 N.W.2d at 510-511 (deli owner's refusal to deliver food to an abortion clinic was *not* unlawful discrimination under applicable state law, because he opposed their practice of performing abortions). Similarly, en employer does not "discriminate" by refusing to finance an employee's off-duty activity—even the exercise of a constitutional right.

The employee is still free to engage in that activity, but has no right to coerced funding by an employer.

D. A Narrowly Crafted Exemption Would Not Constitute The Arbitrary, Unreasonable Discrimination The Constitution Rightly Prohibits.

This case involves no allegations that either Conestoga or Hobby Lobby discriminates against women in hiring, compensation, or other policies. But they cannot comply with the Mandate without sacrificing allegiance to their owners' core convictions. General anti-discrimination principles should not be applied so expansively as to eviscerate First Amendment rights. The Mandate extends far beyond the "meal at the inn" promised by common law and encroaches on a private employer's right to conduct business without a mandate to violate conscience. When this Court rejected a 400-member dining club's facial challenge to a state anti-discrimination law, it recognized that the state could not prohibit the exclusion of members whose views conflicted with positions advocated by an expressive association. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 13 (1988). The employers in this case use no "shorthand" to discriminate against women—rather, they object to funding a narrow range of morally objectionable services.

E. Contraception Is A Gender-Neutral Term.

When the Eighth Circuit considered gender discrimination for purposes of Title VII, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), the Court concluded that contraception is gender-neutral. Title VII generally precludes employment decisions based on an employee's gender. *In re Union Pac. R.R. Emp't Practices Litig.*,479 F.3d 936, 944 (8th Cir. 2007). But where "an employer's action is not based on a sex classification, it is not a sex-based violation of Title VII. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)." *Id.* Moreover, contraception, like infertility, is "not a gender-specific term." *Id.* at 942; *see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers...[it] is gender-neutral"). An employer's refusal to include contraception in its employee health insurance plan is based solely on the owners' conscientious objections—not the sex of any employee.

III. THE RIGHT TO ACCESS CONTRACEPTION DOES NOT JUSTIFY COERCED FUNDING BY UNWILLING PRIVATE EMPLOYERS.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. The government has no power to force a *speaker* to support or oppose a particular viewpoint. *Hurley*, 515 U.S. at 575. Religious liberty collapses when

secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 186-188.

The Mandate grates against the Constitution, essentially banning people of faith from full participation in society. It is tantamount to a statement that "no religious believers who refuse to [finance or facilitate contraception] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. The Mandate's crippling financial penalties will force employers like Conestoga and Hobby Lobby to shut down.

Even though courts have acknowledged constitutional rights to contraception and abortion, there is no corollary right to compel unwilling private employers to finance their exercise. In the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), this Court left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973) (quoting Ga. Crim. Code § 26-1202(e) (1968)). The Mandate compels a private employer to become a "de facto accomplice" to a morally objectionable agenda. Women may have a legal right to contraception or abortion, but they have no accompanying right to draft their employers as unwilling accomplices who must pay for it. In this "clash of autonomies," private employers are entitled to equal protection of their "right to choose." *Reflections on Protecting Conscience for Health Care Providers*, 15 S. Cal. Rev. L. & Social Justice at 340-341, 344.

A. Abortion Is A Highly Controversial, Divisive Issue.

Even if this case were truly about gender discrimination—rather than conscientious objection to a narrow range of services—the contentious nature of abortion is one factor that distinguishes this case from *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (tax-exempt status denied to racially discriminatory school). The activities of a charitable organization must not be "contrary to settled public policy." *Id.* at 585. There is a well-settled, "firm national policy to prohibit racial segregation and discrimination in public education." *Id.* at 593. That policy justified denial of charitable status to a racially discriminatory institution. There is no comparable established policy favoring abortion rights—instead, there is intense division and passionate emotion as the debate rages on.

This Court must protect the rights of *all* citizens. Americans on both sides of the abortion/contraception debate are equally entitled to constitutional protection for their respective positions. The government itself may adopt a position, but it falls off the constitutional cliff when it extracts financial support from private employers—compelling them to finance morally objectionable services. The reproductive rights recognized in recent decades do not trump the inalienable First Amendment rights of citizens who cannot in good conscience support abortion (and/or contraception)—let alone finance it for others. Abortion is too controversial to justify this severe intrusion on the fundamental rights of opponents.

Many deeply religious people view abortion as fundamentally wrong. Concerned citizens across the

country have enacted state laws to regulate it—informed consent, parental notice, waiting periods, and other statutory limitations. The resulting legal challenges are legion. But the very fact that such restrictions have been proposed and passed is evidence that Americans are profoundly troubled and deeply divided.

B. Religious Freedom Is Our *First* Liberty—It Should Not Be Dismantled To Coerce Private Funding Of Abortion Rights.

The right to access contraception/abortion does not trump the time-honored religious liberty expressly protected by the First Amendment. On the contrary, such rights have been plucked out of obscure corners of the Constitution—and there is deep disagreement over their continued viability.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in

> the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden access to contraception. Pro-life advocates have not forfeited their right to conduct business according to their convictions and conscience.

C. No Person Has A Constitutional Right To *Free* Access Contraception. Accommodation Of A Private Employer's Conscience Poses No Threat To Any Employee's Legal Rights.

An employer does not impose its religion on employees merely by declining to finance contraception or abortion-producing drugs—or any other constitutional right. No private party is obligated to facilitate or fund another party's rights—free speech does not encompass a corollary right to compel someone else to pay for the printing or airtime. Employees are free to use contraception, just as they were before the ACA was passed. What they cannot do is compel their employers to finance it. An employer pays for an employee's time and services. It does not monitor—let alone endorse—every purchase the *employee* decides to make. The Mandate tramples basic liberties by requiring the *employer* to maintain an insurance plan

and pay premiums that ensure *free* access to morally objectionable drugs and services.

Even the government is not obligated to finance contraception or abortion. On the contrary, the state may prefer childbirth and allocate scarce resources accordingly. *Harris v. McRae,* 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government has "no affirmative duty to 'commit any resources to facilitating abortions.'" *Id.*, quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989). *See also Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (the Adolescent Family Life Act restricts funding to "programs or projects which do not provide abortions or abortion counseling or referral"). The government's sole obligation is not to impose "undue interference" on abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). Accommodation of a private employer's conscience imposes no burden on any *employee's* rights—but the Mandate does impose "undue interference" on the *employer's* constitutional rights.

The Mandate guts the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Constitution. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* The Constitution bars any public official from prescribing orthodoxy in religion. *Barnette*, 319 U.S. at 642. Private individuals and organizations have an affirmative right to oppose abortion and decline to fund it, free of government intrusion. The government

cannot impose a particular view of sexual morality on private businesses—and even religious institutions—and coerce them to facilitate or finance it.

Some advocates argue that courts must balance conflicting interests and not necessarily accommodate religion where the rights of third parties are detrimentally affected. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal. 2004) (insurance plans required to include contraception); *Catholic Charities of Diocese of Albany v. Seri*, 859 N.E.2d 459, 461 (N.Y. 2006) (same). Some earlier free exercise cases did not implicate third party rights, so it was unnecessary to balance rights. *Sherbert v. Verner*, 374 U.S. 398 (and other unemployment cases); *Wisconsin v. Yoder*, 406 U.S. 205 (parental rights to educate children). In other cases, courts have denied religious exemptions where accommodation would endanger minor children and/or community health. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (medical treatment for child). In these cases, the restriction on religious liberty was narrow and the religious conduct "invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. In other cases, courts have balanced conflicting rights. Sometimes the nature and extent of infringement on the relevant rights is a key factor in the outcome. The Jaycees and Rotary lost free association claims because they could not show that admitting female members would actually hinder their organizational expression. *Roberts v. United States Jaycees*, 468 U.S. 609, 624

(1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

More recently, First Amendment rights to free association have trumped statutory anti-discrimination rights. *Hurley*, 515 U.S. 557; *Boy Scouts of Am. v. Dale*, 530 U.S. 640. This Court cannot brush aside Plaintiffs' conscientious objections to the Mandate without flouting these precedents. Protection of reproductive rights does not justify compelling employers to disregard their deepest convictions when operating a business or ministry—risking financial ruin or professional displacement. That is particularly true in the absence of any employee's right to access free contraception.

D. Other Cases Limiting Religious Freedom In The Commercial Sphere Left The Objector With A Viable Choice. The HHS Mandate Does Not.

Cases involving comparable legal mandates provide some avenue of escape:

- Religious charities required to include contraception in their prescription drug plan could simply discontinue drug coverage—*without* financial penalties.
    - *Catholic Charities of Sacramento*, 85 P.3d at 76 ("[T]he WCEA implicitly permits any employer to avoid covering contraceptives by not offering coverage for prescription drugs.);
    - *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 ("WHWA does not literally *compel* them to purchase contraceptive

coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives.")

- The Ninth Circuit suggested that a religious school could discontinue its employee health insurance program altogether in order to comply with its religious conviction that only male employees should be offered this benefit. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

- A religious school offering supplemental pay to heads of household could discontinue the program and maintain lower salaries for all employees. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

- A religious school could continue to operate, but without the benefits of tax-exempt status. *Bob Jones Univ. v. United States*, 461 U.S. at 603-604 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.")

- Students who object to using mandatory registration fees for student health insurance covering abortion could presumably enroll in another institution. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389 (Cal. Ct. App. 1982).

These "solutions" are counter-productive, harming numerous third parties and restricting access to goods and services. Elimination of medical insurances harms *all* employees, including the women who desired contraceptive coverage in the *Catholic Charities* cases and the female employees in *Fremont Christian School*.

But these alternatives—undesirable as they are—pale in comparison to the draconian HHS Mandate, which leaves larger employers with virtually no escape hatch. Employers may avoid the Mandate only by cutting the work force and discontinuing insurance programs altogether—resulting in a loss of jobs and benefits—contrary to the primary purpose of the Affordable Care Act. The Mandate will ultimately restrict access to goods and services and stall economic growth by forcing conscientious employers to restrict the size of their operations or shut down altogether.

IV. THE GOVERNMENT DISCRIMINATES AGAINST EMPLOYERS WHO HOLD CONSCIENTIOUS OBJECTIONS TO CONTRACEPTION.

There *is* discrimination lurking in the shadows of these cases—not discrimination against *women*, but the government's blatant discrimination against religious business owners. The Mandate's onerous financial penalties threaten the livelihood of employers who cannot in good conscience comply. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs...." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). A citizen may not be excluded from a profession by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) (attorney); *Keyishian v. Bd. of Regents*, 385 U.S. 589,

607 (1967) (professor). ***This is itself a form of discrimination***. It is equally unconstitutional to jeopardize a citizen's livelihood, regardless of the business form—sole proprietorship, partnership, or corporation. This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Establishment Clause demands government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. at 313. The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

A. Believers Do Not Forfeit Their Constitutional Rights When They Enter The Commercial Sphere.

The Mandate discriminates against people of faith by effectively squeezing them out of full participation in civic life. *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-563. Religion does not end where daily business begins. If religion is shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Moreover, morality necessarily intersects the public realm—customers expect businesses to operate with honesty and integrity.

B. Free Exercise Cases Commonly Arise In The Context Of Commercial Activity.

The state actively regulates commerce but has minimal control over the internal affairs of religious

entities. Conflicts between religion and regulation typically occur in commercial settings:

- *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Sunday closing);
- *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases);
- *United States v. Lee*, 455 U.S. 252 (1982) (Amish business);
- *Roberts v. United States Jaycees*, 468 U.S. 609 (commercial association);
- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985);
- *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (hiring);
- *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery);
- *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (Alaska 1994) (housing);
- *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same);
- *Catholic Charities of Sacramento*, 85 P.3d at 93.

Some claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Found., McClure, Swanner, Catholic Charities*). The "commercial" factor does not dictate the outcome.

But with the advent of the draconian HHS Mandate to facilitate free access to contraception and abortion-inducing drugs, even the church sanctuary provides no safe haven from the strong arm of the state.

United States v. Lee is often cited to oppose religious exemptions in the commercial sphere. *Catholic Charities of Sacramento,* 85 P.3d at 93. But *Lee* does

not hold that believers forfeit their constitutional rights in the business world. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm—but not abrogated altogether.

V. OTHER FACTORS ARE RESPONSIBLE FOR THE PROGRESS OF GENDER EQUALITY OVER THE PAST SEVERAL DECADES.

The government asserts vague interests in "gender equality" and "public health" which the Tenth Circuit did not find compelling, describing them as "broadly formulated interests justifying the general applicability of government mandates." *Hobby Lobby*, 2013 U.S. App. LEXIS 13316 at *74, citing *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

As one commentator observed two decades ago:

> [I]t is an offensive and sexist notion that women must deny what makes them unique as women

> (their ability to conceive and bear children), in order to be treated "equally" with (or by) men. Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society.

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993); *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992).

Never before—in the four decades since *Roe v. Wade* or even the two decades since *Planned Parenthood v. Casey*—have women had a legal right to force their private employers to pay for contraception or incur financial penalties that threaten their very existence. Yet women have made extraordinary progress in their ability to secure equal rights and participate fully in American society. That progress in "gender equality" is attributable to a variety of factors unrelated to the ability to access contraception or abortion:

> Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from Roe v. Wade.

Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, in Abortion, Medicine and the Law 154 (J. Butler & D. Walbert eds., 4th ed. 1992). Such progress began decades ago, before the

controversial Mandate was on the horizon. Legislation protects women against unlawful discrimination in employment and other contexts:

- Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 et seq., as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, and the Pregnancy Discrimination in Employment Act amendments of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (discrimination in public and private employment);
- 5 U.S.C. § 201 (mandating anti-discrimination policy in federal employment);
- 5 U.S.C. § 2302(b)(1) (anti-discrimination in personnel policies);
- Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating equal pay);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits);
- 20 U.S.C. § 1221e(a) (mandating anti-discrimination policy in educational institutions receiving federal funds), *id.*, § 1681 et seq. (discrimination in education).

See Linton, *Planned Parenthood v. Casey: The Flight From Reason*, 13 St. Louis U. Pub. L. Rev. at 44 n. 130 (listing these and other statutes). Many states have

constitutional and statutory provisions protecting women against discrimination. *Id.* at 45 n. 131. These protections facilitate access to higher education, better jobs, and a woman's choice to become pregnant and bear a child without sacrificing her career. It is disingenuous for the government to assert that easy access to employer-funded contraception is necessary—or even desirable—to combat discrimination against female employees.

VI. IRONICALLY, THE MANDATE WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING THOSE WHO ADVOCATE IMPOSING IT ON UNWILLING PRIVATE EMPLOYERS.

The right to freely access contraception and abortion is a relatively recent judicial development. Advocates accomplished this dramatic social and political transformation by exercising their rights to free speech, press, association, and the political process generally. The status of various minority groups has improved dramatically because the Constitution guarantees free expression and facilitates the advocacy of new ideas. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 232. But no group can demand for itself what it would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, the Mandate directly attacks the freedom of employers who object to contraception and/or abortifacients. The rights of women to access reproductive services do not trump the rights of everyone else, particularly since no person has

a right to coerced funding from either public or private sources.

This Court needs to preserve the constitutional liberties guaranteed to *all* citizens. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties:

> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

United States v. Ballard, 322 U.S. 78, 95 (1944).

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ... Preserving liberalism, and the civil liberties that go with it, requires a certain level of virtue by the citizenry. Among those necessary virtues is tolerance of those who intentionally or unintentionally offend, and sometimes, when civil liberties are implicated, who blatantly discriminate. A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties.

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245.

This principle cuts across all viewpoints and all constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Boy Scouts of Am. v. Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights—not reproductive rights. But upholding the Mandate will not ultimately advance the cause of any group seeking enhanced constitutional protection. On the contrary, the liberty of all Americans will suffer irreparable harm if a judicially manufactured right to coerced *funding* of reproductive rights is allowed to stifle rights of religion and conscience. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should reverse the Third Circuit in Conestoga and affirm the Tenth Circuit in Hobby Lobby.

Respectfully submitted,

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